Supreme Court, U.S.
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No. 95-697

In The

Supreme Court of the United States

October Term, 1995

RONALD E. CROMWELL and
VICTORINE L. CROMWELL,

Petitioners,

v.

SECURITIES SERVICE NETWORK, INC.,
STEVEN L. COFFEY and ASSET
PLANNING CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT SECURITIES SERVICE NETWORK, INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SHEPHERD D. TATE
(Counsel of Record)
CHRISTOPHER G. LAZARINI
MARTIN, TATE, MORROW
& MARSTON, P.C.
22 North Front Street, Suite 1100
Memphis, Tennessee 38111
(901) 522-9000

Attorneys for Respondent
Securities Service Network, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the parties' agreement to arbitrate disputes pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., evinces a "clear and unmistakable" expression of intent to have the issue of arbitrability decided by the arbitrators rather than the courts?

II. Whether venue was proper in the United States District Court for the Eastern District of Tennessee?

PARTIES

Petitioners, Ronald E. Cromwell and Victorine Cromwell, are individuals.

Respondent Securities Service Network, Inc., is a corporation duly organized and existing under the laws of the State of Tennessee. Securities Service Network, Inc., has no parent company or subsidiaries.

Respondent Steven L. Coffey, an individual, died on July 13, 1995, and a Suggestion Of Death has been filed in this cause.[1]

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[1] Petitioners name Asset Planning Services, Inc. ("Asset Planning"), as a Respondent in this matter; however, summary judgment was awarded in favor of Asset Planning by the United States District Court for the Eastern District of Tennessee, which award was not made a subject of the Petitioners' appeal to the United States Court of Appeals for the Sixth Circuit.

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BRIEF OF RESPONDENT SECURITIES SERVICE NETWORK, INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Securities Service Network, Inc. ("Respondent"),[2] respectfully requests that this Court deny the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit submitted by the Petitioners, Ronald E. Cromwell and Victorine L. Cromwell.

STATUTES INVOLVED

28 U.S.C. § 1391 provides in pertinent part as follows:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

[2] Petitioners refer to Respondent Securities Service Network, Inc., as "Security Services Network".

STATEMENT OF THE CASE

In July 1993, Petitioners filed a Statement Of Claim with the Director of Arbitration of the National Association of Securities Dealers, Inc. ("NASD"), against Respondents. In their Statement Of Claim, Petitioners sought damages for alleged violations of a variety of state and federal laws arising out of their purchase of twenty-two allegedly unsuitable and speculative investments. Petitioners purchased twenty-one of the twenty-two investments at issue more than six years prior to the filing of the Statement Of Claim. Pet., App. 2a-3a.[3]

In response, Respondents filed a complaint in the United States District Court for the Eastern District of Tennessee seeking to enjoin the NASD arbitration proceeding and further seeking a declaratory judgment that Petitioners' claims were not eligible for arbitration before the NASD on the grounds that Petitioners' claims were barred by application of the six year time-bar of Section 15 of the NASD's Code of Arbitration Procedure.[4]

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[3] In addition, Petitioner Victorine L. Cromwell, who became a licensed and registered securities representative in 1983, served as Petitioners' account representative and effected for Petitioners' own account fourteen of the twenty-two investments that were the subject of Petitioners' Statement Of Claim. Pet., App. 2a-3a.

[4] Section 15 of the NASD's Code of Arbitration Procedure provides as follows:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case

Petitioners moved to dismiss Respondents' complaint for lack of subject matter jurisdiction and improper venue. Respondents amended their complaint to assert diversity jurisdiction. Thereafter, the district court determined that venue was appropriate and, accordingly, denied Petitioners' motion to dismiss. Pet., App. 17a-18a. Petitioners then answered the complaint and moved to compel arbitration. Both parties moved for summary judgment.

Applying established Sixth Circuit precedent, the district court partially granted Respondents' motion for summary judgment, holding that Petitioners' claims (save for claims relating to the one investment that had been purchased within the six-year period preceding the filing of the Statement Of Claim) were, pursuant to Section 15 of the NASD Code of Arbitration Procedure, ineligible for submission to arbitration. Pet., App. 13a. Accordingly, the district court enjoined Petitioners from arbitrating any of their claims except those related to the one investment. Pet., App. 14a.

Petitioners filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. After the parties submitted their briefs to the court of appeals, but before oral argument, this Court rendered its opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. ___, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995), wherein the Court restated the standard to be applied in determining whether the

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which is directed to arbitration by a court of competent jurisdiction.

parties agreed to arbitrate the issue of arbitrability as follows:

> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts
>
> * * *
>
> [; provided, however,] when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.

First Options, 131 L.Ed.2d at 993-94 (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)).

Relying on *First Options*, Petitioners argued for the first time at oral argument before the Sixth Circuit that Section 35 of the NASD Code of Arbitration Procedure constituted a "clear and unmistakable" expression of the parties' intent to have the arbitrators determine the issue of arbitrability.[5] The Sixth Circuit disagreed, however, on the basis that Section 35 alone does not "constitute[ ] the

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[5] Section 35 of the NASD Code of Arbitration Procedure states:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

requisite 'clear and unmistakable evidence' that the parties intended and agreed to arbitrate the issue of arbitrability." Pet., App. 6a. Accordingly, the Sixth Circuit held that the district court was the proper forum to address the issue of the timeliness (i.e., arbitrability) of Petitioners' arbitration demand. *Id.* The Sixth Circuit then reviewed and affirmed the district court's determination that venue was appropriate in the Eastern District of Tennessee and the district court's grant of partial summary judgment in favor of Respondents. Pet., App. 6a-9a.

REASONS WHY THE PETITION SHOULD BE DENIED

Primarily at issue before the Court is the question of whether Section 35 of the NASD Code of Arbitration Procedure, standing alone, is sufficiently "clear and unmistakable" evidence of contractual intent to overcome the presumption that courts (as opposed to arbitrators) generally have the primary authority to determine arbitrability. Pet., 6. Petitioners have also stated a sub-issue regarding venue in actions brought to enjoin arbitration proceedings where the demand for arbitration has been untimely made. Pet., 7.

While there exists a conflict among the Circuits on the issue of whether Section 35 provides the necessary "clear and unmistakable" evidence of intent to overcome the presumption that courts decide arbitrability,[6] this case

[6] In addition to the determination of the Sixth Circuit below, *compare Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995) (concluding that, "at

nevertheless does not merit review by this Court for three reasons.[7] First, this Court does not ordinarily sit to resolve issues regarding the interpretation of private contracts. Second, any decision rendered by this Court may well not have the far-reaching impact on the securities industry claimed by Petitioners inasmuch as broker/

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most, Section 35 creates an ambiguity as to who determines arbitrability" which ambiguity "is insufficient to override the presumption that courts determine arbitrability"), *and Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 514 n.6 (7th Cir. 1992) (determining that Section 35 is not a clear and unmistakable expression of intent to have the arbitrators determine arbitrability) *with FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1313 (8th Cir. 1994) ("by adopting the NASD Code of Arbitration Procedure . . . appellants agreed to give the arbitrators discretion via section 35 . . . to interpret section 15's time limitation").

[7] Pursuant to Supreme Court Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

dealers could unilaterally change their customer agreements to specifically exclude the issue of arbitrability from arbitration or Self Regulatory Organizations such as the NASD could amend their arbitration rules to provide a clear statement as to who decides arbitrability. Finally, Petitioners' claims regarding venue likewise do not merit review by this Court because Petitioners have neither stated a valid basis for jurisdiction nor shown that the fact-specific venue issue is important to anyone other than the litigants to this action.

I. Petitioners Present No Important Issue Of Federal Law That Merits Expenditure Of This Court's Limited Time And Resources.

A. This Court does not ordinarily sit to review the interpretation of private contracts.

"[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989). As acknowledged by Petitioners, the arbitrability issue does not present a

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(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

significant or important legal question but rather is simply a matter of contract interpretation. Pet., 6-7; *see also First Options*, 131 L.Ed.2d at 993; *AT&T Technologies*, 475 U.S. at 649. In reaching conflicting decisions, the courts of appeals, including the Sixth Circuit below, that have considered the arbitrability issue in light of Section 35 of the NASD Code of Arbitration Procedure have, as directed by this Court, applied contract interpretation principles. *See* note 6 *supra*. Thus, the circuits have not disagreed on the applicable standard to apply but only as to the result. Inasmuch as this Court does not ordinarily sit to review the interpretation of private contracts, a review of the Sixth Circuit's opinion is not warranted.

B. Any decision rendered by this Court may not have a far-reaching impact.

Because the question faced by the courts is simply one of contract interpretation and because the "clear and unmistakable" statement of the parties' intent can be provided by (i) clarifying changes or amendments to the parties' agreements or (ii) by the arbitration sponsor providing the requisite degree of clarity by amending its rules, any decision that this Court might render would have little precedential effect or practical value. Accordingly, review does not warrant the expenditure of this Court's limited time and resources.

II. Petitioners' Alleged Grounds For Review Of The Venue Issue Do Not Satisfy The Jurisdictional Requirements For Review By This Court Nor Will Consideration Of The Issue Serve An Important Purpose For Anyone Other Than The Parties To This Litigation.

This Court will rarely grant a petition for writ of certiorari "when the asserted error consists of erroneous factual findings." Supreme Court Rule 10. Petitioners do not specifically argue why this Court should grant certiorari on the venue issue except to claim that an "uncertainty [exists] over where venue is proper in actions brought to stay arbitration." This claimed uncertainty does not satisfy the jurisdictional elements ordinarily necessary to support the issuance of a writ of certiorari by this Court. *See* Supreme Court Rule 10, *supra* note 7.

Moreover, this Court's review of the venue issue will serve no important purpose for anyone other than the parties to this litigation. Indeed, to determine whether venue exists in a certain district on the grounds that a "substantial part of the events or omissions giving rise to the claim occurred" in that district necessarily requires an examination of facts peculiar to each individual case. The Sixth Circuit affirmed the district court's determination that venue in the instant case was appropriate in the Eastern District of Tennessee based on the facts that the parties were first introduced in that district at a time when they both resided there, that all of the investments at issue were effected through Tennessee corporations whose principal places of business were in that district and that the alleged fraudulent concealment by Respondents occurred, if at all, in that district. Pet., App. 9a.

Accordingly, in the absence of jurisdictional requirements for review or an otherwise important purpose, review of the venue issue by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

SHEPHERD D. TATE
(Counsel of Record)
CHRISTOPHER G. LAZARINI
MARTIN, TATE, MORROW
& MARSTON, P.C.
22 North Front Street, Suite 1100
Memphis, Tennessee 38103
(901) 522-9000

Attorneys for Respondent
Securities Service Network, Inc.